

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Amendment of Part 90 of the)
Commission's Rules Governing)
Extended Implementation Periods)

PR Docket No. 92-210

To: The Commission

REPLY COMMENTS
OF
NATIONAL ASSOCIATION OF BUSINESS
AND EDUCATIONAL RADIO, INC.

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TABLE OF CONTENTS

SUMMARY	ii
I. BACKGROUND	1
A. NABER Comments	1
B. Comments of Other Parties	2
II. REPLY COMMENTS	5
III. CONCLUSION	12

SUMMARY

The comments filed in this proceeding generally echo the concerns expressed in NABER's comments. APCO, however, suggested that Public Safety channels be restricted from access by Business Radio service eligibles, or that Business Radio service eligibles licensing Public Safety channels through intercategory sharing not be permitted to seek extended implementation periods for these channels, even though otherwise qualified. NABER opposes both these recommendations. NABER also does not completely support AMTA's attempt to distinguish between existing SMR licensees and new SMR entrants as to the length of time either should be afforded to construct and place wide-area systems in operation. Similarly, NABER does not agree with CICS's suggestion to restrict extended implementation periods to only existing SMR licensees, and only for existing systems that will be converted to cellular-like systems with "hand-off" capability.

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The National Association of Business and Educational Radio, Inc. ("NABER"), pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. Section 1.415, hereby respectfully submits its Reply Comments in response to the Comments filed by various parties in the above-captioned proceeding.

I. BACKGROUND

A. NABER Comments

In its initial Comments, NABER generally supported the Commission's proposed modifications of Section 90.629 of the rules to include SMR channels as eligible for extended implementation periods, increase of the extended implementation period from three to five years, and the elimination of the annual reporting requirement. However, NABER cautioned the Commission against routinely authorizing extended implementation periods. NABER suggested the Commission scrutinize all requests and ensure that sufficient justification was set forth to justify an extended

period of time in which to construct and place a system into operation.

NABER also sought clarification of the modification to the Sections 90.629 and 90.631 in connection with the formula the Commission proposed when channel recovery occurred. NABER believed that the method set forth was merely a codification of the Commission's existing policy, but requested the Commission address this proposed modification in its final action in this proceeding.

Additionally, NABER sought Commission clarification on when a Finder's Preference Request may be submitted in connection with a failure to abide by an authorized implementation schedule. Currently, it is unclear whether a party may file a request six months after a construction benchmark has been missed, or whether a party must wait six months after the extended implementation period has expired.

B. Comments Of Other Parties

Only the Associated Public-Safety Communication Officers, Inc. ("APCO"), one of the other eleven parties submitting comments in this proceeding,¹ opposed the Commission's proposed modifications to Section 90.629. Generally, the other commenting parties favored the Commission's proposals.

¹ Reply Comments were also filed by Utilities Telecommunications Council ("UTC"), Fleet Call, Inc., Southern California Gas Company ("SoCal Gas"), American Mobile Telecommunications Association, Inc. ("AMTA"), Council of Independent Communication Suppliers ("CICS"), an affiliate of the Industrial Telecommunications Association, Inc., Southern California Edison Company ("SoCal Ed"), Delmarva Power Company ("Delmarva"), EDS Corporation ("EDS"), PowerSpectrum, Inc., and Texas Utilities Electric Company ("TU Electric").

APCO not only opposed the Commission's proposal to extend the implementation period under Section 90.629 from three to five years, but also urged the Commission to eliminate the Business and Industrial/Land Transportation radio services eligibility to Public Safety pool channels through intercategory sharing.² Alternatively, APCO suggested that non-public safety radio service eligibles should not be allowed to request or obtain an extended implementation period for Public Safety pool channels licensed through intercategory sharing.

Other than APCO, the majority of commenters supported the Commission's proposal to extend the implementation period from three to five years. However, AMTA recommended the Commission limit the number of years a new SMR applicant proposing to establish a wide-area system could request to implement the system to a maximum of three years rather than five years. UTC, on the other hand, recommended that non-commercial, e.g. public utility companies, be permitted to request the required period of time necessary to implement a proposed system, with a cap of ten years. EDS also supported this proposal, but recommended that any entity converting a conventional system to a system using trunked technology be eligible to request this longer implementation period.

The Commission's proposal to broaden the eligibility for extended implementation period to SMR channels was supported by entities which commented on the proposal. However, like NABER,

² See 47 C.F.R. § 90.621(g).

several parties had reservations about SMR licensees receiving an extended implementation authorization without the imposition of some safeguards by the Commission. Both CICS and AMTA suggested that the five year implementation period be authorized only to existing SMR licensees who were seeking to reconfigure existing stations to technically advanced wide-area systems. CICS would further restrict extended implementation schedules to specific types of advanced technology systems. UTC recommended, similar to NABER's comment, that the Commission scrutinize requests for extended construction periods by SMR applicants.

The Commission's proposal to eliminate the annual reporting requirement received limited support, except for APCO who opposed this proposal. AMTA and CICS sought assurances that the Commission continue strict oversight of any system authorized an extended implementation period. Additionally, many parties expressed concern and sought clarification on the issue of when the Commission would cancel channel and base stations authorizations. UTC, Fleet Call, TU Electric, SoCal Ed, and Delmarva Power argued that the Commission should not cancel any portion of an authorization until the end of the extended implementation period. Further, TU Electric, SoCal Ed, and Delmarva Power asked the Commission to affirm its policy of permitting a licensee to modify its extended implementation schedule with proper justification.

A majority of the commenters approved the Commission's proposal to clarify the loading criteria for systems with extended implementation schedules, and conform the loading requirements to

those currently imposed on systems without extended implementation schedules. PowerSpectrum, however, questioned the wisdom of imposing any loading requirement for systems who would be authorized extended implementation schedules on adoption of the rules in light of the sunset provision in the rules which eliminates loading requirements for stations authorized after June 1, 1993.

II. REPLY COMMENTS

For the most part, the comments filed in this proceeding expressed concerns similar to those set forth in NABER's comments. However, NABER opposes APCO's suggestion that Public Safety channels be restricted from access by Business Radio service eligibles, or that Business Radio service eligibles licensing Public Safety channels through intercategory sharing not be permitted to seek extended implementation periods for these channels, even though otherwise qualified. Nor can NABER support AMTA's attempt to distinguish between existing SMR licensees and new SMR entrants as to the length of time either should be afforded to construct and place wide-area systems in operation.³ Additionally, NABER does not agree with CICS's suggestion to restrict extended implementation periods to only existing SMR licensees, and only for existing systems that will be converted to cellular-like systems with "hand-off" capability.

³ NABER has expressed its concerns and suggested conditions that the Commission should impose when an SMR applicant seeks an extended implementation period for new stations comprising a wide-area system. See In re Applications of Dial Page, Inc. Request for Waiver filed June 22, 1992, Case No. 92143.

APCO opposes the Commission' extension of the existing implementation periods because it feels that the three year period is adequate for most systems. It encourages the Commission to address the need for additional periods to implement a system on a case-by-case basis, as the Commission has done in the past. NABER disagrees with APCO's position. The Commission states that its experience evidences that a five year period is a more realistic time frame in which to place a large, complex telecommunications system into operation.⁴ This statement suggests that the Commission receives a number of requests that seek extension of the current three-year extended implementation period. In light of the Commission's diminishing resources and increased responsibilities, NABER believes that the Commission's initial conclusion that extending the maximum period for implementation of these systems to five years by rule is correct (where such an extended period is warranted) and adoption of the proposed rule should reduce the number of requests seeking extensions of the implementation period that the Commission must process.

On the other hand, the increased period should not be routinely granted to every applicant. NABER reiterates its view that the Commission must scrutinize each request and ensure that the applicant has provided adequate justification for the length of time sought. Nevertheless, the processing of the initial requests should be less cumbersome than Commission review of the numerous requests seeking to extend implementation periods.

⁴ Notice at para. 4.

NABER strongly opposes APCO's suggestion that the Commission consider modifying the intercategory sharing rules to restrict licensing of Public Safety pool channels by Business and Industrial/Land Transportation radio service eligibles when channels allocated to their respective services are not available in a particular geographic area. First, the proposal is beyond the scope of this proceeding and would require that the Commission issue a Further Notice of Proposed Rule Making, or initiate a separate rule making proceeding. Further, APCO's proposal is contrary to the Commission's goal to encourage the most spectrum efficient use of the spectrum. In geographic areas in which spectrum is congested and intercategory sharing is used to expand system capacity, the out-of-category channels meet telecommunications needs of businesses which provide services to the public and may be utilized to protect the safety and welfare of the public, even though the licensee may not be a "public safety" eligible. APCO's proposal to eliminate the intercategory rules in connection with Public Safety pool channels could result in spectrum lying fallow contrary to the public interest.

APCO's alternate proposal to prohibit authorization of extended implementation periods for Public Safety channels licensed to non-public safety entities is not acceptable to NABER. An entity who proposes a complex, integrated system, and is otherwise eligible for an extended implementation period, should not be penalized when a portion of the channels authorized are from an out-of-category pool. This restriction would result in channels

lying fallow, or a licensee constructing an out-of-category channel and then having to expend more resources to integrate the channel into the system at a later date. NABER cannot support such a result, and opposes this proposal.

NABER also takes issue with AMTA's proposal to treat new SMR entrants and existing SMR licensees differently in regard to the amount of time one would have to implement a complex, technically advanced wide-area system. NABER, as previously stated, does not support a routine grant by the Commission of a five-year extended implementation period for SMR systems. NABER is concerned that "rubber-stamp" approval of five year implementation periods for SMR systems will lead to speculative filings and hoarding of spectrum. Accordingly, NABER urged the Commission to require sufficient justification of need to obtain such authority.

NABER supports the Commission's consideration of extended implementation periods for new SMR entrants, but conditions its support on the Commission imposing additional performance safeguards as delineated in NABER's Reply Comments to the Dial Page Waiver request. As discussed in those Reply Comments, NABER urges the Commission to impose certain conditions, such as a performance bond and cancellation of the all authorizations associated with a system, on the new licensee should the system failed to be substantially constructed as proposed and as authorized. The imposition of these conditions should discourage speculative filings. Nevertheless, the Commission should not discriminate between a new applicant and an existing licensee in regard to the

maximum time that could be sought under the rules to implement a similarly designed system, as long as the Commission imposes the conditions previously recommended by NABER.

CICS' proposal is more restrictive than AMTA's because a new SMR applicant would be unable to obtain any extended implementation period, except by waiver. CICS contends that only existing SMR licensees can demonstrate the need for an extended implementation period. Further, CICS urges the Commission to implement a two-part test to determine whether the SMR system is eligible for the extended implementation period. First, the licensee must be proposing to reconfigure the existing system by re-using authorized channels at new sites within the service area of the existing systems. Secondly, the licensee must also be implementing a technology that hands-off calls from one cell to another within this service area.

NABER, as discussed above, does not believe that existing SMR licensees should obtain an advantage over new SMR entrants in connection with the ability to seek an extended implementation period or the maximum time that may be sought, but with the caveat discussed above that the Commission imposes additional conditions on the new SMR entrant to discourage speculators from warehousing spectrum. However, NABER agrees that a new SMR entrant may not be able to demonstrate to the Commission's satisfaction the need for a three to five year extended implementation period. It is quite possible a new SMR entrant may not be able to evidence sufficient need for any extension of the construction and operational period

for trunked systems. Nevertheless, NABER believes that a new applicant should be permitted the same opportunity to demonstrate to the Commission the need for the maximum extended implementation period under the rules, rather than having to seek relief by waiver. The waiver process is cumbersome to both the applicant and the Commission. The Commission resources are better utilized processing applications under the rules. Therefore, eliminating a new SMR applicant's ability to request an extended implementation period by rule may result in additional Commission resources being expended and is not in the public's interest.

The Commission's proposal in the Notice seems to indicate that a failure to meet an implementation benchmark could result in cancellation of the channel authorization or base station authorization. A number of parties, including NABER, sought Commission clarification on this issue. Many of the commenters asked the Commission to clarify that no portion of a system authorization would cancel until after the expiration of the extended implementation schedule, and that the Commission permit licensees to modify their implementation schedules upon an appropriate showing.

NABER agrees that the construction schedule of a large, complex technically advanced system is difficult to gauge. Certainly, in today's business world, budget concerns and financing may become problematic. NABER believes that the Commission should permit a licensee some flexibility in modifying its implementation schedule, but there must be a reasonable showing that the failure

to meet the authorized implementation schedule is not due to the licensee's negligence in timely proceeding with planning and construction of its system.

However, if the Commission provides this flexibility to the licensee, the Commission should also strictly enforce and penalize licensees for a failure to meet the authorized or modified construction benchmarks. NABER contends that if a licensee has the opportunity to modify its schedule and foreclose Commission action, but fails to do so, there is an indication of lack of intent to construct the system and a lack of attention to the system's implementation. Licensees should not be able to tie up spectrum unless the Commission has some assurance that the system will be implemented as promised. A failure to meet construction benchmarks should be treated in the same manner as a failure to timely construct a system not authorized an extended implementation period.

III. CONCLUSION

WHEREFORE, the National Association of Business and Educational Radio, Inc. respectfully requests that the Commission act in accordance with the views expressed herein.

Respectfully submitted,

**National Association of Business
and Educational Radio, Inc.**

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